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# SPECIAL TRIBUNAL FOR LEBANON AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

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The subject. The article analyses the practice of the Special Tribunal for Lebanon and its Judgement of 18 August 2020, rendered against those found guilty of a terrorist act and the impact on the progressive development of international criminal law.

The purpose. This article seeks to define what goal the international community pursued in establishing the Special Tribunal for Lebanon from the perspective of international security law, international criminal justice, and counter-terrorism cooperation. The legal nature of the terrorist attack of 14 October 2005 is essential in this regard: is the crime is comparable in its gravity and consequences to the crimes of genocide or war crimes in the territory of the former Yugoslavia or Rwanda, which predetermined the subsequent establishment of ad hoc international criminal tribunals? Further, was the establishment of the Special Tribunal for Lebanon an attempt to make the crimes of terrorism an international crime in practice? Finally, was the establishment of the Tribunal an attempt to lay the groundwork for a new type of international judicial bodies with jurisdiction over crimes of terrorism?

The methodology. The authors use such general theoretical and specific scientific methods as comparative analysis, generalization, interpretation and classification as well as systemic analysis and formal logical methods.

The main results. The legal qualification and analysis of the circumstances of the terrorist attack do not enable the conclusion that the bomb explosion in Beirut was comparable in danger and consequences to any international crimes or was a threat to international peace and security. In its turn, the involvement of the Security Council in the establishment of the Tribunal does not unequivocally evidence its alleged attempt to create a purely international criminal structure.

The choice of applicable law granted to Lebanon and the fact that the crime committed solely affected the interests of that State would qualify the Tribunal as an internationalized judicial body, whose work would focus on defining the crime of terrorism through a broader lens of interpreting national legislation. In other words, the impetus for development has been given not to international but national criminal law.

The Tribunal was created neither to progressively develop international criminal law with regard to defining terrorism as an international crime nor to advance the international criminal justice system. Rather, it was an attempt to address Lebanon's specific political and legal challenges.

Conclusions. The outcome of the Tribunal's work could have a rather negative impact on the development of international criminal law, discrediting the very idea of enabling "peace through justice" and uniform, consistent application and interpretation of international criminal law.

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## 1. Introduction

On August 18, after 11 years of trial, the Special Tribunal for Lebanon ("STL") rendered its judgment against those accused of having committed a terrorist act that occurred on 14 February 2005 in Beirut. Along with the lives of 21 people, the explosion also took the life of Rafiq Hariri and injured 226 persons. According to the STL's verdict, Salim Ayyash, a member of the organization "Hezbollah", was found guilty of conspiracy and commission of a terrorist act with the use of an explosive device, premeditated and attempted murder and sentenced to five terms of life imprisonment. Three other defendants have been found not guilty. [1] Although "Hezbollah"'s involvement in the crime had not been established, [2] it refused to hand over the main accused to the Lebanese law enforcement. Therefore, for the first time since the Nuremberg Tribunal [1, pp. 126], Salim Ayas was found guilty in absentia.

The scope and consequences of the above-mentioned crime have created a unique situation in international criminal justice: the establishment, at the initiative of the international community, of a special judicial institution to administer justice over a single act of terrorism.

Although large terrorist attacks had taken place before 14 February 2005 (such as the Bombay bombings (1993), bombings of the U.S. Embassies in Kenya and Tanzania (1998), terrorist attacks of 11 September 2001, an attack on tourists in Bali (2002) and others), the establishment of the STL was the first of its kind. Before the Tribunal was established, similar ideas had been voiced following the assassination of King Alexander of Yugoslavia and Louis Barthou, Foreign Minister of France, on 9 October 1934 in Marseille.

As a result of the work of the Experts' Committee, a draft Convention on the Establishment of an International Criminal Court with jurisdiction over a single crime, that of international terrorism, was developed in 1937 within the framework of the League of Nations. However, the Convention never entered into force.

The Tribunal was established under United Nations Security Council Resolution 1664 (2006). Resolution 1757 (2007) contained the text of the Agreement between the United Nations and the Republic of Lebanon establishing the STL[3] and its Statute. In practice, the international community, by vesting a body with the primary responsibility for the maintenance of international peace and security, had embarked on the tried and tested path of establishing *ad hoc* judicial bodies [2, pp. 485-489] as in the case of the International Tribunal for the Former Yugoslavia (UNSC Resolution 827 (1993)), the International Tribunal for Rwanda (UNSC Resolution 955 (1994)), the Special Court for Sierra Leone (UNSC Resolution 1315 (2000)). In this case, however, it was not the international community, represented by the United Nations or a group of States, but the acting Prime Minister of Lebanon, who requested the Secretary-General of the United Nations to do so. [4] The different approaches to the establishment, compared to the Tribunals for the Former Yugoslavia and Rwanda, as well as the differences in their structure and composition, are the hallmarks of this judicial body, which prevent it from being fully international and give it the names of an "internationalised", "mixed", "hybrid" organ of international criminal justice [3; 4]. At the same time, the STL is neither a subsidiary organ of the United Nations nor a body of the Lebanese judicial system [5, p. 49; 6, p. 187].

Other pre-STL tribunals had another defining feature, as they exercised jurisdiction over persons

[1] The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 6904.

[2] Ibid. Par. 765, 787.

[3] Internal political conflicts had prevented the Agreement from being ratified, which is why the Tribnal was established pursuant to the Resolution of the Security Council. It is also believed that Security Council Resolution 1757 was not aimed at creating the tribunal, but at overcoming internal tensions.

[4] See: UNSC Res 1595 (7 April 2005) UN Doc S/RES/1595; UNSC Res 1644 (15 December 2005) UN Doc S/RES/1644; UNSC Res 1664 (29 March 2006) UN Doc S/RES/1664; UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

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responsible for serious violations of international humanitarian law, genocide, crimes against humanity (i.e., international crimes). In other words, before the inception of the International Criminal Court, the creation of such tribunals had been the established practice of setting up ad hoc tribunals in the aftermath of world wars (Leipzig Trials 1921, International Military Tribunal to Punish Major War Criminals of the European Axis, International Military Tribunal for the Far East) or armed conflicts accompanied by large-scale crimes. The degree of gravity and danger of the crimes committed on the part of the international community as a whole was matched by that of an international judicial body that exemplified the administration of justice on behalf of the whole international community.

In this regard, one is faced with a question: what was the purpose that the international community pursued in establishing the STL? Was the terrorist act of 14 February 2005, in terms of its gravity and consequences, comparable, for example, to the crime of genocide or war crimes in the territory of the former Yugoslavia or Rwanda? Was the establishment of the STL an attempt to transpose the crime of terrorism (in this case, a specific occurrence) into the category of international crimes? Was the establishment of the Tribunal an attempt to lay the groundwork for a new type of international jurisdiction with jurisdiction over crimes of terrorism [7, p. 201-202] (with a subsequent prospect of a permanent court, which could not be established in 1937)?

## 2. The gravity of the act

The United Nations Security Council strongly condemned the terrorist attack in Beirut, stating that those acts (as well as terrorism in all its forms and manifestations) and their consequences constitute a threat to international peace and security and called for all those responsible to be brought to justice. [5] It was stressed that in line with all previously adopted resolutions, all States shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to terrorist acts and shall ensure that those responsible do not evade prosecution (Resolution 1636 (2005)). This is the standard response of the United Nations Security Council to all acts of terrorism, regardless of the number and identity of the victims, the scale of the destruction, or the affected State. No reasons were given for giving special importance to the investigation of the particular crime in question. Of course, the assassination of any State's political leadership constitutes a threat to international peace and security, to stability both within the country and within the region. However, similar crimes, such as the assassination of Muhammad Anwar al-Sadat, President of Egypt, in a terrorist attack on 6 October 1981, the murder of Mr. Olof Palme, Prime Minister of Sweden on 28 February 1986, or the assassination of the Head of Libya, Muammar Al-Qadhafi, on 20 October 2011, did not lead to the creation of an ad hoc international judicial body. Moreover, R. Hariri was not the first Prime Minister of Lebanon to die in a terrorist attack. On 17 July 1951, Riad al-Solh, the first Prime Minister of Lebanon since the declaration of independence in 1943, was shot dead in Amman by members of the Syrian Social Nationalist Party. On 1 June 1987, Rashid Karam, on his 8th term as the Prime Minister of Lebanon, was killed by a bomb in his own helicopter [8, p. 303]. These crimes, however, had no repercussions similar to the murder of R. Hariri.

Against this context, one can conclude that since the terrorist act of 14 February 2005 was not underscored by the UN Security Council [2, pp. 506-508; 9, p. 521] as being special in the range of other terrorist acts or comparable in gravity to the events, which led to the establishment of the Special Tribunals for the former Yugoslavia, Rwanda and Sierra Leone, there is no reason to claim that the bombing in Beirut is tantamount to any international crime or threat to international peace and security [10, p. 293]. In addition, the Security Council's

[5] See: UNSC Res 1595 (7 April 2005) UN Doc S/RES/1595; UNSC Res 1636 (31 October 2005) UN Doc S/RES/1636; UNSC Res 1644 (15 December 2005) UN Doc S/RES/1644; UNSC Res 1664 (29 March 2006) UN Doc S/RES/1664; UNSC Res 1748 (27 March 2007) UN Doc S/RES/1748; UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

involvement in the setting up does not unequivocally lead to the conclusion that an exclusively international criminal judicial structure was being set up. [9, p. 523; 11, p. 47]. Moreover, as will be shown below, the very assessment of the crime and the establishment of the Tribunal for Lebanon may have been more of a political step [2, p. 493-496; 12, p. 182] rather than a desire to progressively develop international law.

### 3. The terrorist attack of 14 February 2005 as an international crime or a crime of an international character

International Legal Scholarship distinguishes between two fundamental categories of crime: these are international crimes and crimes of an international character. There are several reasons for drawing a line between the two. [13].

Firstly, the subject of the crime. Unlike international crimes, which are committed by States via their leaders, senior officials, or other representative individuals, crimes of an international character (transnational) are committed by private individuals outside the framework of State activities, on their own initiative to achieve their own illegal aims, for personal gain. While in the case of international crimes, the perpetrator is the State itself (through its responsible officials and other persons linked to the State and using the State apparatus to carry out the crimes), when one talks about crimes of international character, the State is not involved in their commission. Quite on the contrary, it combats them to make sure the illegal activity ceases, is stopped and the perpetrators are brought to justice. Responding to such crimes in its own territory is a direct duty and obligation of any State. These state actions are carried out primarily based on international cooperation, as these crimes affect the interests of two or more States [14, p. 194].

The second defining characteristic is the presence of a foreign element. International crimes affect the interests of the entire international community, violate peremptory norms of general international law, and erga omnes obligations. On the contrary, crimes of an international character are ordinary crimes aggravated by a «foreign element» and, as a consequence, affecting the interests of two or more States.

The third difference is the degree of public danger of the crime in question. The gravity of these crimes is incomparable: international crimes violate fundamental norms of international law and threaten international peace and security, whereas international crimes entail less public danger.

The fourth difference is the source of criminal responsibility: responsibility for international crimes is both treaty-based and customary, whereas the responsibility for crimes of an international character is always treaty-based, as it stems from a violation of a specific international treaty, the provisions of which a State had incorporated into its national law. The difference is also evident in the fact that the responsibility for the commission of international crimes can be exercised both within the framework of national law and at the international level through the organs of international criminal justice. At the same time, the responsibility for a crime of an international character would lie exclusively with the national jurisdiction.

During the drafting of the Tribunal's Statute, there had been ideas to qualify the crimes of terrorism committed in Lebanon as crimes against humanity [15, p. 352]. This was supposed to be backed by the timeframe from 1 October 2004 to 12 December 2005 (Statute, art. 1), since, as it was argued, the terrorist attacks occurred as a result of a campaign of systematic attacks against the civilian population [9, p. 518-519]. However, although the temporal jurisdiction of the Tribunal covered both the period before and after the assassination of R. Hariri and the whole series of terrorist acts was indeed qualified as one series of crimes, it was the crime of terrorism that the facts ultimately amounted to.

The domestic character of the process was also derived from the circumstances of the terrorist attack, as well as from the objective qualification of the crime in terms of international law (regardless of the position of the Tribunal, Lebanon, or the United Nations Security Council). In particular, concerning international treaties applicable to the terrorist attack of 14 February 2005, Lebanon was not a party to either the 1997 International Convention for the

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Suppression of Terrorist Bombings, or to the 1999 International Convention for the Suppression of the Financing of Terrorism, but was a party to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including diplomatic agents of 1973 and the Arab Convention for the Suppression of Terrorism of 1997. At the same time, the designated international treaties apply to cooperation in the suppression of acts of terrorism only if the committed crime affects the interests of more than one State ( such as by virtue of the nationality of the suspect, the victims, the ownership of the property destroyed, etc.). The act of terrorism in Beirut under consideration was directed exclusively at Lebanon [2, p. 507; 9, p. 518; 16, p. 696; 17, p. 1157], and is therefore not an international crime [15, p. 353; 18, p. 770 ]and the act of terrorism under national criminal law [19, p. 1140-1142]. Moreover, according to the assessment of the Interlocutory Decision rendered by the Appeals Chamber of the Tribunal in 2011, the Chamber did not seek to hold individuals accountable under international criminal law for terrorism in Lebanon and has attempted to interpret and apply Lebanese criminal law in accordance with certain international legal standards relating to the crime of terrorism. Although this approach, which has since been extended to the Judgement itself, has been widely criticized for its manifestly wrong interpretation and application of international law [16; 20, p. 997–999, 1005–1014; 21, p. 1024-1029], including by the judges of the STL themselves[6]), it directly underscored the priority significance and exclusive application of domestic law [22].

According to art. 2 of the Tribunal's Statute, the applicable law is defined as the Lebanese Penal Code and the Law of 11 January 1958 "On Strengthening Penalties for Subversive Activities, Civil War and Sectarian Enmity". Of course, the Judgment of 18 August 2020 refers to the application by the STL of various sources of law[7] and principles of interpretation under the law of treaties, [8] to the existence in the Tribunal's Statute of provisions similar to those of the Nuremberg Tribunal, ICTY, ICTR and the Rome Statute of the International Criminal Court [9], to the need to ensure the accused's right to a fair trial[10]. At the same time, the Tribunal makes it clear that, unless any exceptions exist, the Tribunal will apply the Lebanese law[11] instead of customary international law, which would only apply if the relevant rules had been implemented in domestic law) [12] and does not intend to invoke foreign or international judicial practice[13]. The vast majority of the charges are based on the Lebanese Criminal Code and the 1958 Law[14]; the Lebanese law is more favourable to the accused[15].

The aforementioned nature of the Tribunal has also affected the qualification of the crime of terrorism. Although the STL referred to UN Security Council Resolutions that defined the crime as a

[6] Separate opinion of Judge Janet Nosworthy. The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 5, 34, 49–52, 57, 58, 65, 111.

[7] The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 5863.

[8] Ibid. Par. 5969 – 5970.

[9] Ibid. Par. 1917, 1931–1932.

[10] Ibid. Par. 69 – 70.

[11] Separate opinion of Judge Janet Nosworthy. The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. §48.

[12] The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 6195; Separate opinion of Judge Janet Nosworthy. The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 52.

[13] Separate opinion of Judge Janet Nosworthy. The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 121.

[14] The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 5876.

[15] Ibid Par. 6013, 6144.

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threat to international peace and security and thus opposed acts of terrorism to international crimes [23, p. 666-667], the Tribunal's assertion that a definition of terrorism exists in customary international law [7, p. 30] (voiced, inter alia, by the President of the Tribunal) [24, p. 105] was widely criticized [16; 20; 21; pp. 1024-1029]. Moreover, the majority of the STL judges noted that, for the administration of justice, the existence or absence of such a definition in customary international law at the time of the commission of the crime was irrelevant. [16]. Even if such a definition had existed, the Statute would have only allowed the Tribunal to apply the provisions of the Lebanese Criminal Code. [17]Thus, the terrorist act of 14 February 2005, from the perspective of the Tribunal, was a domestic crime prosecuted under domestic law by a court established at the initiative of Lebanon itself. This eliminated the possibility of legally transforming the crime of terrorism into an international crime [23, p. 670-671] (which should not imply that the STL ever pursued such a goal).

It is these circumstances that determine the significance of the Tribunal in the international criminal justice system [25]. The choice of applicable law granted to Lebanon, the nature of the crime committed, affecting the interests of that State alone, enables us to attribute the Tribunal not so much to the category of international criminal courts as to those with "international characteristics", "internationalized versions of national courts" [9, p. 514-517, 521, 524], a court of "international character applying Lebanese national law" [18], whose role in respect to the definition of the crime of terrorism focused on a broader interpretation of national legislation [20, p. 1000-1005; 21, p. 1037-1041; 23, p. 660-664]. In other words, the new impetus for development has been given not to international law but national criminal law.

## 4. Establishment of the Tribunal as a political move

In the political context, the most likely and justified reason for the establishment of the Tribunal is that by 2005 Syrian troops had been present in the Lebanese territory for some 30 years. Various high-ranking Syrian officials have been accused of their involvement in the attack ever since [12, p. 1160-1163; 18, p. 776-778]. These suspicions and accusations are reflected, directly or indirectly, in United Nations Security Council resolutions. Thus, the calls for strict respect of sovereignty, territorial integrity, unity, and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon may appear somewhat strange from the perspective of an investigation of a terrorist act. [19]. At the same time, the resolutions noted the Security Council's concern at the findings of the United Nations International Independent Investigation Commission that it was highly probable that the decision to assassinate the former Prime Minister R. Hariri could not have been received without the approval of high-ranking Syrian security officials. It was due to this connection that Syria was called upon to cooperate fully and unconditionally in the course of the investigation; special measures were imposed on specific individuals, as identified by the Commission (such as restriction of movement, enforcing their appearance for questioning, freezing of funds and financial assets, etc.) [20] Finally, there was a clear demand that Syria should refrain from interfering directly or indirectly in the internal affairs of Lebanon and attempting to destabilise the country. The question of Lebanon's future was to be resolved peacefully by the Lebanese themselves, free from intimidation and foreign interference

[16] Separate opinion of Judge Janet Nosworthy. The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 119.

[17] The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Trial Chamber Judgement) STL-11-01/T/TC (18 August 2020) par. 6193.

[18] Ibid. Par. 5953.

[19] See: UNSC Res 1595 (7 April 2005) UN Doc S/RES/1595; UNSC Res 1636 (31 October 2005) UN Doc S/RES/1636; UNSC Res 1664 (29 March 2006) UN Doc S/RES/1664; UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

[20] See: UNSC Res 1636 (31 October 2005) UN Doc S/RES/1636; UNSC Res 1664 (29 March 2006) UN Doc S/RES/1664.

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(Resolution 1636 (2005)). Syria subsequently agreed to cooperate fully with the investigation. In April 2005, all Syrian troops withdrew from Lebanon. Ultimately, Syria's involvement in the attack has not been established or proven at the level of either the indictment or judgement. Furthermore, any decision otherwise would have resulted in the reclassification of the crime of terrorism as an act of aggression by Syria, i.e. an international crime. Thus, the creation of the STL could have pursued several distinct policy objectives. On the one hand, in the absence of direct evidence of an act of aggression by Syria, this could have been a preliminary step towards a very broad objective of "bringing to justice all persons found guilty of committing this terrorist crime" [21]. On the other hand, the establishment of the Tribunal prevented the investigation from being silenced, avoided unsubstantiated allegations of Syrian involvement in terrorism [26, p. 619-620], and prevented an open armed confrontation between the Lebanese and Syrian forces [27]. In other words, not so much the proceedings before the Tribunal as the active measures taken to establish it were a means of securing a peremptory norm of international law [28] on the settlement of international disputes by peaceful means. The main conclusion, as far as the subject matter of this study is concerned, is that the purpose of the STL (based on its investigation and judgement) was not, after all, aimed at the progressive development of international criminal law (to qualify an act of terrorism as an international crime) or the development of an international criminal justice system, but as an attempt to address Lebanon's specific political and legal challenges.

## 5. Conclusion

As the practice suggests, International criminal tribunals are established by the international community on a case by case (ad hoc) basis to administer international justice based on the rules of international law in respect of persons accused of international crimes. However, this was not the case with the STL. With the involvement of the United Nations, an *ad hoc* judicial body had been established to administer justice on the basis of domestic law against persons accused of crimes of exceptionally domestic significance. This, in turn, gave rise to the assessment of the STL as a body that considered political assassinations and represented selective justice by some members of Lebanon's political elite against others [8, p. 300-304]. For these reasons, the work of the Tribunal is unlikely to make a significant contribution to the progressive development of international criminal law. Having based itself on domestic legislation, the Tribunal was selective in its application and limited, not always a well-founded interpretation of the applicable law necessary for the administration of justice. Thus, the STL effectively isolated itself from all previous international practice, focusing on domestic categories and qualifications. This is partly to the detriment of the drafting process of the Tribunal's Statute and the conclusion of a treaty between Lebanon and the United Nations, since all of the work carried out over the span of 13 years, could have just as well been carried out by national judicial bodies at less expense and with fewer practical difficulties. Moreover, the outcome of the STL is hardly remarkable. One person was sentenced to imprisonment, three others accused were acquitted, none of whom was tried in person (which also called into question the objectivity of the investigation and the trial, as well as the rights of the accused [29-30]). Salim Ayyash, sentenced to five life terms, is currently a fugitive from justice. The trial itself, accompanied by the Tribunal's very contradictory interim conclusions, is likely to have a rather negative impact on the development of international law and undermine the international community's confidence in judicial institutions and mechanisms as such, in the possibility of ensuring «peace through justice» [8, p. 299, 306], and in the uniform, consistent application of the rules of international law [16, p. 699].

[21] See: UNSC Res 1644 (15 December 2005) UN Doc S/RES/1644; UNSC Res 1664 (29 March 2006) UN Doc S/RES/1664; UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

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